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SCHOOL LAW BULLETIN INDEX

(1970 – 1975)

Editor: Robert E Phay

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Editor

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WRITTEN STUDENT CONDUCT CODES: AN ESSENTIAL INGREDIENT IN REDUCING AND CONTROLLING STUDENT MISCONDUCT*

One of the most difficult and persistent problems facing school boards, school administrators, and teachers is how to deal with student conduct that is considered unacceptable in the school. Student protest and serious misconduct are frequent in the public schools. A survey of the nation's 29,000 public and nonpublic high schools by the House Subcommittee on General Education in 1969 reported that 18 per cent of them had had a serious student protest.[1] Serious protest was defined as student activity involving such acts as strikes, boycotts, sit-ins, or riots.

This percentage did not decline in the years that immediately followed, nor did the violence, which increased at an alarming rate. In April 1975, the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency reported that between 1970 and 1973, homicides in the schools increased by 18.5 per cent; rapes and attempted rapes by 40.1 per cent; robberies by 36.7 per cent; assaults on students by 85.3 per cent; assaults on teachers by 77.4 per cent; and drug and alcohol offenses by 37.5 per cent. The Subcommittee's preliminary report, Our Nation's Schools--A Report Card: "A" in School Violence and Vandalism, states: "Simply put, the trend in school violence over the last decade in America has been, and continues to be, alarmingly and dramatically upwards." The Subcommittee's chairman, Senator Birch Bayh of Indiana, emphasizes the seriousness of the problem when he notes that "[t]he ledger of violence confronting our schools reads like a casualty list from a war zone or a vice squad annual report." Not only the human cost, but also the property cost is high. The report states that the $500 million cost in vandalism "equals the total amount expended on textbooks throughout the country in 1972."

Nor has the concern generated by increased violence declined. The Sixth Annual (1974) Gallup Poll of Public Attitudes Toward Education reported that the public considered lack of discipline in the schools to be the primary school problem (for the fifth time in six years), and two-thirds of those interviewed believe schools are "a breeding ground" for crime and violence. More recently (1975), the United States Supreme Court, in Goss v. Lopez,[2] noted the size of the problem: "It is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased in recent months."

Notwithstanding these surveys and reports, it is my opinion that major crime, at least in the small and middle schools of the Southern and border states, has declined in the last three to four years. The operation of fully desegregated schools for several years has left us today with fewer misconduct problems than we experienced immediately after we desegregated. Several school superintendents and principals have reported to me in the last year that serious crime and malicious vandalism, which almost always have been committed by a small percentage of the student body, peaked three to four years ago and have been declining since that time. (A similar decline has been reported for less serious types of misconduct.) One Mississippi superintendent told me in early September that his school, which is 45 per cent black, has had fewer incidents of violence than it experienced a few years ago. Several North Carolina superintendents and principals have reported the same fact. The Mississippi superintendent also reported that the tested performance level of black students, although still low, is two to three grade levels above what it was when they were tested in all-black schools only a few years ago. The tested performance of the white students had remained at

*This article is a statement the author made before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency on September 17, 1975.

1. The National Association of Secondary School Principals also reported in 1969 that 59 percent of 1,000 high schools studied had experienced some kind of student protest or activism.

2. 419 U.S. 565 (1975).

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approximately where it had been. North Carolina administrators report similar results.[3]

I do not mean to suggest, however, that school misconduct is not a serious problem. It clearly is. It is important, however, that the Congress and state legislatures not over-react, as some parents and schools have done. For example, the response I have witnessed in several school districts of automatic suspension and expulsion for relatively minor misconduct, particularly when the child is a difficult child, only serves to shift the problem from the school to the community at large. The removal from school almost always results in increased misbehavior, not a reduction of it. The misconduct is only at a different place.

I. CAUSES OF STUDENT UNREST

This statement will not extensively analyze the causes of student unrest, but some understanding and appreciation of why students rebel and protest are essential to a constructive approach to the problem.

The causes of unrest in high schools are many. Dissent has focused on a wide variety of concerns that differ from school to school. A New Jersey school board report listed thirty-seven issues that have resulted in protest, ranging from those over which the school has little or no control--such as the events in Southeast Asia, the CIA, and the recession--to those that are basically school matters --such as dress and hair regulations, smoking rules, and curriculum.[4] A 1969 report by the United States Office of Education listed the following major issues with which students are typically concerned: (1) dehumanization of institutional life; (2) inequities in society; (3) educational irrelevancies; and (4) racial and cultural discrimination.[5] These concerns have produced a discontent that a single spark can ignite. Incidents that have furnished such a spark were found to fall into five general categories: (1) racial conflicts, (2) political protests, (3) resentment of dress regulations, (4) objections to disciplinary actions, and (5) educational policy issues. These issues continue to be the primary ones that concern students today, and these reports indicate that some delinquency is created by the school. Greater restrictions, particularly when they are viewed as unfair, often produce greater student reaction, and when the stress level is raised in the school, so is the misconduct.

The causes of school unrest listed above are only a reflection of the concerns in society at large; the increase of crime in schools merely mirrors the increase in crime everywhere.[6] The problem, however, is that parents want schools to be as they remember them 30 years ago, when schools indeed were more disciplined and structured and had an authority that no longer exists. For schools to impose the discipline they once did, however, simply is not possible. One reason is that they no longer have the degree of legal authority they once had. The almost total in loco parentis role the school enjoyed in years gone by, when it had almost the same authority over the pupil while he was at school as the parent had over him at home, is gone.[7] Over time, the in loco parentis doctrine was substantially modified, particularly as applied to secondary school pupils, and the courts became more willing to examine school actions and to overturn those found arbitrary or unreasonable. Another reason why the discipline and structure found in schools thirty years ago is not possible today is that the former level of discipline is not today found or imposed in the home and in other places of our society. The discipline in the public schools of thirty years ago--which were basically white and middle class or black or ethnically identifiable--was reinforced by the discipline standard set at home. Consequently, schools, which had had a homogeneous student body, mirrored home standards. In many respects, schools do that today, but they now are pluristic, containing all classes and races of people. Thus it seems to me that students today cannot be expected to modify their behavior in school substantially, at least not for long periods of time, when the restraints placed on the student in school are not found outside the school. The student who has substantially modified his behavior to acceptable school standards when he enters the school door will revert to his usual behavior when he finds himself unsupervised.

I also note that most of the incidents of unrest in high schools occur suddenly and spontaneously and are touched off, for example, by the election of cheerleaders all of one race, the search of a student, or a fight between two students. The spontaneous nature of the high school disruption makes responsible action more difficult for the teacher, principal,

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3. A North Carolina principal reported to me that the tested performance of students in his senior high school of 1,200 (30 percent of whom were black) increased for both black and white students. The additional programs added to enable black students to catch-up were successful in improving test scores of black students, but they also resulted in improved test scores of white students. Consequently, the gap between the black and white students did not decrease.

4. New Jersey Federation of District Boards of Education, *Student Activism and Involvement in the Educational Program* (1970).

5. U.S. Office of Education, *Report of Subcommittee on Easing Tensions in Education* (1969).

6. See "The Crime Wave," *Time*, Vol. 105 (June 30, 1975), 10-24.

7. For a historical discussion of the *in loco parentis* doctrine, see S. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 377-84 (1969).

superintendent, and school board because they must react immediately to keep the incident from reaching crisis proportions. Such situations require delicate judgment. The best way of reducing these incidents and increasing judicious response to such incidents is to reduce class size, employ a faculty that reflects the racial and ethnic background of the student body, reduce or replace school structures housing more than 1,200 high school students or more than 900 junior high school students, increase supervision, and educate school personnel in the techniques of properly dealing with these problems. These recommendations require more people and more money.

Three of these recommendations--reduction in school populations, replacement of antiquated school structures, and increased supervision--deserve special comment. When high school buildings house more than 1,000 or 1,200 adolescents, they become too large to deal with the student as a person. The same is true for middle schools housing more than 900 students. In my opinion, it is absolutely essential for an orderly school program that the school's administrators maintain close contact with the staff and the students. When student bodies much exceed 1,000 and the staff exceeds 60 to 70 people, they are too big. When these limits are exceeded, a second level of administrators is created and students--and to some extent staff--develop a sense of powerlessness. Students lose their identity as a special person in whom the school is particularly interested and concerned and the result is an increase in antisocial behavior. Thus, in my judgment, the large urban schools of 3,000 to 4,000 students are programmed for high levels of serious student misconduct and little can be done to avert trouble.

The replacement of antiquated school structures, particularly the big ones in the urban centers, is another way of helping to reduce friction among students and the resulting misconduct. Unfortunately, many of the secondary school buildings being used today were built before World War II, when concepts for managing students were different than they are today. Typically, these buildings have narrow, long corridors and fixed class space. Although this design was adequate for that time when there was a more homogeneous student body, the pluristic student body today needs more elbow room. Consequently, different types of facilities are needed.

Still another important ingredient in reducing student misconduct, is increased supervision of students, particularly supervision outside the classroom. When classes empty into the halls or onto the school grounds, teachers or someone else should be present to supervise. Even if teachers merely step into the halls at the end of instruction periods, unacceptable student conduct is reduced. Unfortunately, however, one recent result of negotiated teacher contracts has been a reduction of out-of-class supervision by teachers. Some teachers' unions have been successful in eliminating any teacher responsibility for supervision except in the classroom. If teachers do not supervise before and after school and in the halls and lunchrooms, then the school must employ someone else to do it.

II. SUSPENSION AND EXPULSION AS A DISCIPLINARY TOOL

Whatever the cause or precipitating act, the disruptive conduct may result in suspension or expulsion of a student. Removing a student from school is a serious action by the school. (It can, however, be used in a nonpunitive context, for example, to reduce tensions or to provide more time than is immediately available to deal with a problem.) Because of its seriousness, only seldom can it be justified when the removal is long-term. One justifiable occasion is when a student's continued presence on the school grounds endangers the school's proper functioning or the safety or well-being of himself or other members of the school community. Another such occasion occurs when the removal offers the only effective way of both communicating to the student that his conduct was unacceptable and emphasizing to his parents that they must accept a greater responsibility in helping the student meet school standards of acceptable conduct, and this situation is the usual reason for imposing short-term suspensions. When either of these situations exists, the student should be removed from the school. When neither exists, other ways of dealing with the problem should be sought.

Separating a student from school is a poor method of discipline. Students who misbehave usually have academic difficulties, and removing them from school almost inevitably adds to these problems. Frequently, suspension or expulsion is precisely what a delinquent student wants. Also, as the school breaks contact with a student and loses its opportunity to work with him to eliminate his antisocial behavior, he may continue his misconduct in a way more dangerous to himself and others than the behavior for which he was expelled.

Thus expulsion in my judgment should be avoided if possible. This does not mean, however, that a disruptive child should be retained in the classroom, or that improper conduct should be ignored. When the classroom is not the place for a problem child, other provisions should be made for him if possible. For example, he might be put into a special group where closer supervision and greater individual attention are available, a device commonly referred to as in-school suspension. Concerned and caring adults and appropriate community facilities like family service agencies, mental health clinics, or the public health service might be asked to work with the problem student. Please note, however, that most of these alternatives to removing the student are expensive.

I also note that some children disrupt classes because they feel alienated or inadequate. For these children, the school should try to offer learning in a way that builds self-confidence rather than destroys self-respect. Classroom instruction should have meaning and relevance to the child's situation. If it does, an important preventive action has been taken that should reduce the need to use suspension and expulsion as a disciplinary device. A discussion of the types of changes that a school can make to deal with these problems, such as adjustments in the curriculum, is beyond the scope of this article. Most of these changes cost money.

III. STUDENT CONDUCT CODES

The school can take several preventive measures to reduce serious misconduct. One is the development and adoption of a written school board conduct code. The code should consist of three basic parts. The first part should set forth the student's basic constitutional rights in the school, such as the right to speak and express his opinions, even if the opinions are unpopular.

The second part should list the categories of misconduct for which disciplinary action is appropriate. I recommend a code that is much more specific than the typical state statute. The typical school expulsion statute will authorize the school to suspend or expel a pupil who willfully violates the rules of the school, is guilty of immoral or disreputable conduct, or is a menace to the school. I recommend that the school board develop a particularized listing of misconduct deemed serious enough to warrant expulsion or long-term suspension. The types of serious school misconduct that I think should be included in this code are set out in the appendix and fall well within the broad powers granted in the typical state statute. However, they eliminate as grounds per se for expulsion or long-term suspension such vague concepts as immoral or disreputable conduct. This section of the code should specifically prohibit such misconduct as intentional destruction of property, and willful assault on students or school employees. But the code should not recite the criminal code. The criminal law should be viewed as operating separately, though sometimes concurrently, with school discipline. I see no need, for example, specifically to prohibit arson or burglary. A school rule is not required to remove a student for this type of criminal behavior, and furthermore these criminal acts are forbidden by the school rules prohibiting damage or destruction of school or private property.

It should be noted that the misconduct rules set out in the appendix omit several types of student behavior that often are the basis for student expulsion. Long hair on males, which cannot be prohibited in five of the country's ten federal courts of appeals, and possession or distribution of "obscene" materials are not included in the list. Adequate rules to interdict either activity are extremely difficult to write and, if written, often will stimulate the very conduct they seek to prevent.

Consideration also should be given to enumerating the types of conduct that, if engaged in, would result in less severe punishment than suspension or expulsion. For example, a code section on lesser offenses might prohibit such conduct as intentional damage of property, plagiarizing, hazing, truancy, fights, and failure to comply with directions of teachers and principals.[8] This minor misconduct code need not be adopted by the board of education unless state statutes require it to be board approved. There often is merit in permitting the students, teachers, and administrators of each secondary school to develop its own minor misconduct code and tailor it to the school's needs, although different policies for different high schools on such matters as truancy or smoking can create problems. If this code is developed at the school-house level, it should be reviewed every three or four years. It is important to continue student and teacher involvement with the code and to update it to reflect changes in society and the student culture.

The third part of the code is a procedure for dealing with violations of the code's conduct section.[9] These procedures should be ones that produce a reliable establishment of the facts and insure the procedural due process rights of the student while minimizing the adversary nature of the proceeding. When the school seeks to suspend or expel a student, the question usually is not whether the student engaged in the misconduct but the penalty to be applied. Thus a hearing on whether the student is guilty of the misconduct is often neither demanded nor constitutionally necessary. When, however, the student challenges the school's right to discipline--such as when he has distributed a newspaper that the school says is obscene or denies the school's allegation that he is guilty of misconduct--then a procedure that meets constitutional requirements must be followed. For short-term suspensions (10 days or less), the constitutionally required procedure mandated by the Supreme Court earlier this year in Goss v. Lopez[10] is notice of the charges and, if the student denies them, an explanation of the evidence against him and an opportunity to tell his

8. These types of behavior may result in the major penalty of expulsion. See the recommended provisions on serious student misconduct in the appendix, which provide that repeated failure to comply with teacher directions, substantial damage to property, or intentional physical abuse of a student or school employee may result in expulsion.

9. For a procedure recommended by the author, see R. Phay and J. Cummings, *Student Suspensions and Expulsions: Proposed School Board Codes*, Institute of Government: Chapel Hill, N. C. (1970), pp. 23-47.

10. 419 U.S. 565 (1975).

side of the story. For expulsion, minimum standards are generally thought to include (1) adequate notice to the student of the charges against him and the nature of the evidence to support those charges, (2) a hearing, and (3) a disciplinary decision that is supported by the evidence.

IV. REASONS FOR A WRITTEN CODE

Written school board regulations on student conduct that constitutes serious misbehavior and written procedures for handling violations of those regulations have long been advisable at the junior high and secondary school levels. But they are now becoming a necessity as courts require specificity in rules and certain procedural observances before a suspension or expulsion is imposed.[11] The particularized code is necessary to save vague statutory language from being misused and to keep school actions taken pursuant to it from being declared invalid on the basis that the statute grants undue discretion and is unconstitutionally vague.

Another reason for these codes, both board-adopted district and school building codes, is the opportunity to involve students and teachers in developing the code. The involvement of students will help communicate to them that their support and assistance is needed to make school a worthwhile experience. If students help develop these school codes, they will see better that they are the primary beneficiary of an orderly school operation and that they, as members of the school community, have a responsibility and interest in promoting a good learning environment.

The adoption of a written student conduct code also will help teachers, principals, and other school employees clearly understand the ground rules of school discipline. Clear regulations and procedures will serve as a guide to school employees in troublesome situations. The teacher, no less than the student, needs to know the types of student conduct prohibited, the types of conduct that usually will result in expulsion, and the types of conduct that are to be punished or curbed by the teacher's discipline. With respect to teacher discipline, I think it is important for the code to make clear that the teacher is expected to make every effort to handle personally the usual problems of maintaining classroom discipline before involving the principal. It also is essential that the individual school develop written procedures for handling teacher referrals of misbehaving students. Such procedures should require adequate records and provide for promptly notifying the teacher of the principal's action on the misconduct.

Written codes also will help teachers if they define the procedures and limitations on the use of corporal punishment and the search of a student or his locker. The teacher needs to know the limits on corporal punishment and the search of a student, because improperly administered corporal punishment[12] or an illegal search[13] may result in a civil suit against the teacher for assault or invasion of privacy. Furthermore, if he violates the student's "rights, privileges or immunities secured by the constitution and laws," the teacher may be sued and found to be personally liable under Section 1983 of the federal Civil Rights Act of 1871.[14]

Still another reason for a written code is to protect the student against a violation of his constitutional rights and to avoid a reversal of the school's action if a court later finds the school impermissibly suspended[15] or expelled the student.[16] Another danger is that without written codes, students may be left unaware of their due process safeguards and less likely to assert their rights, particularly if the punishment is not too offensive, or the right sacrificed seems relatively unimportant. A written code that is updated with the latest court decisions provides an invaluable tool in operating a constitutionally sound and fair disciplinary procedure.

V. PROCEDURE FOR DEVELOPING A STUDENT CODE

Although the adoption of a student conduct code is a responsibility of the local board of education, I recommend that the code not be written by the school administrators and board alone. I suggest that the school board establish a committee from the various constituencies within the secondary school community--students, teachers, parents, and administrators--and that this committee develop the code using several of the available model codes as a guide.[17] The committee should give all interested and affected people an opportunity to come before the committee and make recommendations and suggestions. When the committee has completed a final draft of the code, which should have been carefully

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11. A monograph to be published later this fall by NOLPE (National Organization on Legal Problems in Education) and the ERIC Clearinghouse on Educational Administration examines the legal aspects of student suspensions and expulsions. A copy may be obtained from NOLPE, 825 Western Blvd., Topeka, Kansas, 66606.

12. See, e. g., Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937).

13. See, e. g., Phillip v. Johns, 12 Tenn. App. 354 (Ct. App. 1930); and Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973).

14. 42 U.S.C. 1983.

15. See, e. g., Goss v. Lopez, 419 U.S. 565 (1975).

16. Wood v. Strickland, 420 U.S. 565 (1975).

17. A collection of Model Student Codes can be found in a publication entitled *Student Codes: A Packet on Selected Codes and Related Materials*, (Cambridge, Mass., Harvard Center for Law and Education, 1971).

reviewed by someone familiar with the statutory and constitutional law of student conduct, the draft should then go to the school board for its consideration. The board should publicize the proposal and invite comment and criticism of it. After receiving this comment, the board should adopt the code with such amendments as it thinks necessary. The code then becomes the official school board policy on student conduct and should be publicized widely, with a copy given to each student and a copy mailed to all parents.

The final adoption of the student conduct code does not mean, however, that the school board is through with this issue. Student conduct codes need to be reviewed regularly by students and staff. One reason for periodic review is to make revisions required by the law, since this area of the school's operation is currently in a state of great change. The primary reason for regular review, however, is to continue to serve those objectives noted earlier of creating a better understanding among students of the need for and their role in the orderly operation of schools.

When these things have been done, a local board of education should have clear rules on student misconduct and an orderly and precise procedure for handling it. These rules and procedures will go far in assuring that the student is treated fairly, in minimizing the likelihood of disruption to the educational process from student misconduct, and in complying with the constitutional requirements of due process.

--Robert E. Phay

APPENDIX

Recommended Serious Student Misconduct Code

The following rules prohibiting serious student misconduct were taken from STUDENT SUSPENSIONS AND EXPULSIONS: PROPOSED SCHOOL BOARD CODES by Robert E. Phay and Jasper L. Cummings, Jr., Institute of Government: Chapel Hill, N.C. (1970), pp. 16-22.

RULE 1. DISRUPTION OF SCHOOL

A student shall not by use of violence, force, noise, coercion, threat, intimidation, fear, passive resistance, or any other conduct intentionally cause the substantial and material disruption or obstruction of any lawful mission, process, or function of the school.

Neither shall he engage in such conduct for the purpose of causing the substantial and material disruption or obstruction of any lawful mission, process, or function of the school if such a disruption or obstruction is reasonably certain to result.

Neither shall he urge other students to engage in such conduct for the purpose of causing the substantial and material disruption or obstruction of any lawful mission, process, or function of the school if a substantial and material disruption or obstruction is reasonably certain to result from his urging.

While this list is not intended to be exclusive, the following acts--when done for the purpose of causing a substantial and material disruption or obstruction of any lawful mission, process, or function of the school--illustrate the kinds of offenses encompassed here: (1) occupying any school building, school grounds, or part thereof with intent to deprive others of its use; (2) blocking the entrance or exit of any school building or corridor or room therein with intent to deprive others of lawful access to or from, or use of, the building or corridor or room; (3) setting fire to or substantially damaging any school building or property; (4) firing, displaying, or threatening use of firearms, explosives, or other weapons on the school premises for any unlawful purpose; (5) prevention of or attempting to prevent by physical act the convening or continued functioning of any school, class, or activity or of any lawful meeting or assembly on the school campus; (6) preventing students from attending a class or school activity; (7) except under the direct instruction of the principal, blocking normal pedestrian or vehicular traffic on a school campus; and (8) continuously and intentionally making noise or acting in any manner so as to interfere seriously with the teacher's ability to conduct his class.

RULE 2. DAMAGE OR DESTRUCTION OF SCHOOL PROPERTY

A student shall not intentionally cause or attempt to cause substantial damage to valuable school property or steal or attempt to steal school property of substantial value. Repeated damage or theft involving school property of small value also shall be a basis for long-term suspension or expulsion from school.

RULE 3. DAMAGE OR DESTRUCTION OF PRIVATE PROPERTY

A student shall not intentionally cause or attempt to cause substantial damage to valuable private property or steal or attempt to steal valuable private property either on the school grounds or during a school activity, function, or event off school grounds. Repeated damage or theft involving private property of small value also shall be a basis for long-term suspension or expulsion from school.

RULE 4. ASSAULT ON A SCHOOL EMPLOYEE

A student shall not intentionally cause or attempt to cause physical injury or intentionally behave in such a way as could reasonably cause physical injury to a school employee

(1) on the school grounds during and immediately before or immediately after school hours,
(2) on the school grounds at any other time when the school is being used by a school group, or
(3) off the school grounds at a school activity, function, or event.

Neither self-defense nor action undertaken on the reasonable belief that it was necessary to protect some other person is to be considered an intentional act under this rule.

RULE 5. PHYSICAL ABUSE OF A STUDENT OR OTHER PERSON NOT EMPLOYED BY THE SCHOOL

A student shall not intentionally do serious bodily injury to any person

(1) on the school grounds during and immediately before or immediately after school hours,
(2) on the school grounds at any other time when the school is being used by a school group, or
(3) off the school grounds at a school activity, function, or event.

Neither self-defense nor action undertaken on the reasonable belief that it was necessary to protect some other person is to be considered an intentional act under this rule.

ULE 6. WEAPONS AND DANGEROUS INSTRUMENTS

Option One

A student shall not knowingly possess, handle, or transmit any object that can reasonably be considered a weapon

(1) on the school grounds during and immediately before or immediately after school hours,
(2) on the school grounds at any other time when the school is being used by a school group, or
(3) off the school grounds at any school activity, function, or event.

This rule does not apply to normal school supplies like pencils or compasses but does apply to any firearm, any explosive including firecrackers, any knife other than a small penknife, and other dangerous objects of no reasonable use to the pupil at school.

Option Two

A student shall not knowingly possess, handle, or transmit a knife, razor, ice pick, explosive, loaded cane, sword cane, machete, pistol, rifle, shotgun, pellet gun, or other object that reasonably can be considered a weapon

) on the school grounds during and immediately before or immediately after school hours,
(2) on the school grounds at any other time when the school is being used by a school group, or
(3) off the school grounds at a school activity, function, or event.

This rule does not apply to normal school supplies or compasses.

RULE 7. NARCOTICS, ALCOHOLIC BEVERAGES, AND STIMULANT DRUGS

A student shall not knowingly possess, use, transmit, or be under the influence of any narcotic drug, hallucinogenic drug, amphetamine, barbiturate, marijuana, alcoholic beverage, or intoxicant of any kind

(1) on the school grounds during and immediately before or immediately after school hours,
(2) on the school grounds at any other time when the school is being used by any school group, or
(3) off the school grounds at a school activity, function, or event.

Use of a drug authorized by a medical prescription from a registered physician shall not be considered a violation of this rule.

RULE 8. REPEATED SCHOOL VIOLATIONS

A student shall not repeatedly fail to comply with directions of teachers, student teachers, substitute teachers, teacher aides, principals or other authorized school personnel during any period of time when he is properly under the authority of school personnel.

RECENT COURT CASES

NORTH CAROLINA'S USE OF NTE DECLARED UNCONSTITUTIONAL *United States v. State of North Carolina,* _____F. Supp._____ (E.D.N.C. 1975).

Facts: In 1964 the State Board of Education began to require a minimum score on the National Teachers Examination as a prerequisite to teacher certification in North Carolina. In 1972 it abolished a minimum score requirement and reduced the significance of an applicant's NTE score to a factor accounting for 10 to 25 points on a 150-point scale. In 1973 the North Carolina legislature enacted G.S. 115-153, which directed the State Board to reinstate a certification requirement of no less than a 950 score on the NTE, the score used by the State Board at the time it dropped the requirement.

Because the 950 cut-off eliminates 31.08 per cent of the black candidates for teachers' licenses compared with 1.36 per cent white candidates, the United States Department of Justice charged the State of North Carolina and the State Board of Education with a pattern and practice of racial discrimination in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. 2000e, the Equal Employment Opportunities Act. The North Carolina Association of Educators and twenty-four black teachers representing the class of unsuccessful black applicants for certification later joined the United States as plaintiffs, and the Educational Testing Service submitted a brief in behalf of the plaintiffs. Since the constitutionality of a state statute was at issue, the case was heard by a three-judge federal court. In a partial decision, the court held for the plaintiffs on the merits, reserving judgment on the issue of damages owed to the affected class (some 15,000 people). The court has requested the parties to brief and prepare to argue nine separate questions on the damages issue.

Holding: In the opinion by Judge Craven, the court held that the NTE minimum score requirement violates the equal protection clause of the Fourteenth Amendment because it is a job criterion with no proven relationship to job performance that tends to eliminate racial minority candidates. The state statute is arbitrary because it is not related to a legitimate state purpose. Therefore, G.S. 115-153 is unconstitutional, even with the 1975 legislative amendment that granted the plaintiff class a probationary certificate convertible to a regular certificate after two years of satisfactory teaching. The State of North Carolina is enjoined to issue all past and present candidates for certification the certificate they would have held but for the NTE requirement.

In addition to its holding, the opinion contains interesting dicta on two points. First, the court finds as a fact that the state cannot rely on all its accredited teacher-training institutions "to produce candidates for certification who possess minimal academic capabilities." Placing the blame on the state for viewing with "apathy and indifference" the level of training provided by some of its black institutions before integration, the court says, "...[W]e view it as more than coincidental that written testing of teacher applicants coincided with the movement of black teachers into previously all-white schools." Second, and on the other hand, the opinion says that the state has the right and perhaps the duty to ascertain the minimum level of academic achievement necessary for competent teaching. Judge Craven states that there is nothing clearly wrong with the NTE, with cut-off scores in general, or even with a 950 cut-off in particular, so long as the test and score can be proved to predict the job performance of North Carolina teachers.

NONTENURED FACULTY: INSTITUTIONAL ACTS THAT MAY CREATE A CONSTITUTIONALLY PROTECTED INTEREST IN PERMANENT EMPLOYMENT. *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975).

Facts: In 1967, Dr. Soni, a citizen of India, joined the mathematics department of the University of Tennessee as a visiting associate professor. During the 1967-68 school year, the chairman of the math department told Soni that his visiting appointment would be extended for the 1968-69 school year, and a decision about a permanent appointment would be made in the fall of 1968. In October 1968, the chairman sent the tenured members of the math department a recommendation that Soni be appointed an associate professor with tenure. Later that month the acting department chairman, appointed when the regular chairman became ill, called a special meeting to consider Dr. Soni for the permanent appointment. At that meeting it was pointed out that the Tennessee statutes and university regulations prohibit conferring tenure on a person who is not a citizen of the United States. Consequently, no formal vote was taken on appointing Soni to a permanent faculty position, but his rank was changed from visiting associate professor to associate professor for the 1969-70 school year. Soni was then congratulated by the faculty members who had attended the meeting, who assured him that the action taken on him at the meeting "had been favorable." Shortly thereafter, Soni received a letter from the acting chairman notifying him that he had been appointed an associate professor without tenure and that the question of tenure would be deferred until he became a citizen of the United States. Because Soni considered the letter to be unfavorable, he asked the acting chairman for an explanation and was told that the meeting on his appointment had been favorable, the faculty wanted him to stay, and his prospects with the university were good. Soni states that he was also told that he now would be treated like any other tenured professor. And in fact he was permitted to participate in the university retirement program, which ordinarily was available only to permanent personnel, and to attend departmental meetings, where he voted on tenure for other teachers. He also continued to receive verbal assurances from his colleagues that he would be permanent. On December 15, 1971, he became a United States citizen. On March 8, 1972, however, Dr. Soni was notified that his appointment would be terminated on August 31, 1973, because his performance as a teacher and as a research mathematician had "not been of the quality we expect of the tenured staff."

Soni was not given a hearing on the issue of his nonrenewal, and he brought suit in the federal district court. The trial court found "there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a

reasonable expectation of future and continued employment." The court held the university "objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process." (376 F. Supp. 289.) From this decision the university appealed.

Decision: The University of Tennessee argued that Soni could not have acquired a reasonable expectation of continued employment because the university had a well-established tenure system that would have prevented any expectancy from arising in a professor who had not been granted formal tenured status. The court rejected this argument, saying that the existence of a written tenure system is but one factor for the trial court to consider in analyzing the due process claim of a formally non-tenured professor. From the facts cited above, the court concluded that Dr. Soni "had a viable understanding that his employment would continue on a permanent basis, notwithstanding the letter of October 29 that Dr. Soni's position was without tenure."

The Sixth Circuit affirmed the trial court's decision that Soni was entitled to back wages until the university completes a due process hearing. Citing the United States Supreme Court's decision in the de facto tenure case of Perry v. Sindermann, the trial court said that the existence of a property interest would not entitle Soni to reinstatement but it would "obligate college officials to grant a hearing at his request." The hearing procedure that the trial court required and the Court of Appeals approved is the following:

"Plaintiff here should be afforded a statement of the charges against him, the names of witnesses who will appear on behalf of the University and the nature of their expected testimony, an opportunity for plaintiff to appear with an attorney, at a hearing before an appropriate tribunal that possesses some academic expertise, and answer and confront charges against him. It should be emphasized, however, that a fair and adequate hearing need not be conducted in a trial-like atmosphere."

BOOKS, AUXILIARY SERVICES, AND MATERIALS FOR PRIVATE SCHOOLS: VIOLATIONS OF THE ESTABLISHMENT CLAUSE. *Meek v. Pittenger*, 43 U.S.L.W. _____ (May 19, 1975).

Facts: Two Pennsylvania statutes authorized nonpublic schools to receive public education funds. The first authorized the state to provide "auxiliary services," including counseling, testing, psychological services, speech and hearing therapy, remedial instruction, and the like. The second authorized the state to lend textbooks and also provided that nonpublic school officials could request the loan of "instructional materials," defined as periodicals, photographs, maps, charts, sound recordings, films, and the like.

The statutes were attacked on the basis that each was "a law respecting an establishment of religion in violation of the First Amendment." A three-judge federal district court upheld the validity of the textbook loan program and the provision for auxiliary services but invalidated the loan of instructional equipment "which from its nature can be diverted to religious purposes." Plaintiffs appealed directly to the Supreme Court.

Analysis and Holding: A sharply divided Court affirmed the validity of the textbook loan program and struck down the provisions for instructional materials and auxiliary services. Reviewing earlier Establishment Clause cases, the Court repeated the three-prong test to be applied to any statute allowing state assistance to religious organizations: first, it must have a secular legislative purpose; second, it must have a "primary effect" that neither advances nor inhibits religion; and third, the statute and its administration must avoid "excessive entanglement" with religion.

The Court found the textbook loan program to be indistinguishable from the New York program that the Court had approved in Board of Education v. Allen, 392 U.S. 236 (1948). The Court reasoned that the loan of nonsectarian books was to the students; therefore the financial benefit is to students and parents and not the schools.

The loan of instructional materials, however, founder on the "primary effect" prong of the Supreme Court's test because of the "predominantly religious character of the schools benefiting from the Act." The Court approved the secular intent of providing educational benefits to all school children, but reasoned that once the materials were obtained, they easily could be used by the school for religious purposes. The schools argued that the materials and equipment were "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." But the Court found it unreasonable to try to separate secular educational functions from the predominantly religious character of the church-related schools, which constituted more than 75 per cent of the schools covered under the act. "Substantial aid to the educational function of [church-related] schools...necessarily results in aid to the sectarian school enterprise as a whole."

The Court reversed the district court's validation of the third statutory provision authorizing the state to provide "auxiliary services" directly to nonpublic school children with special

needs. The Court again acknowledged the legitimate secular purpose of the act, but rejected Pennsylvania's plan because the auxiliary services were provided in the nonpublic schools and only when requested by nonpublic school officials. The district court had validated the services because they were expressly "secular, neutral and ideological" and were only supplements to the basic educational programs of nonpublic schools. As such they were seen as incidental, indirect, and therefore permissible. The Supreme Court found fault, however, with the district court's exclusive reliance "on the good faith and professionalism of the secular teachers and counselors functioning in church related schools to ensure that a strictly nonideological posture is maintained." The Court feared the pervasive influence of religion in nonpublic schools might affect the "auxiliary services," and any additional contacts to insure noninvolvement would be excessive entanglement between church and state in violation of the third aspect of the Court's test.

The Court found no distinction in the fact that the auxiliary services were limited to remedial and exceptional students. "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."

The schools argued that the personnel involved were public school employees and therefore not directly subject to the discipline of a religious authority in the nonpublic schools. The Court reasoned that even public employees operating in an atmosphere "dedicated to the advancement of religious belief" might not be able to remain strictly neutral as required under the First Amendment.

Finally, the Court found that the statutes, relying on continued appropriations and therefore annual reconsideration, created too great a potential for divisive conflict over the issue of aid to religion, which the Court called "political entanglement." This potential political polarization along religious lines was "one of the principal evils against which the Establishment Clause was intended to protect."

NOTICE AND HEARING REQUIRED ON THE NONRENEWAL OF A NONTENURED TEACHER'S CONTRACT IN NORTH CAROLINA'S WESTERN DISTRICT OF THE FEDERAL COURT. *Sigmon v. Poe*, 391 F. Supp. 430 (W.D.N.C. 1975).

Facts: Plaintiff, a nontenured teacher in the Charlotte-Mecklenburg schools, in 1973 brought an action in the Federal District Court for the Western District of North Carolina claiming that the nonrenewal of her contract without notice or a hearing violated her constitutional rights of due process. Judge McMillan ruled that the state statute, G.S. 115-142(m)(2), which provides that the school board may refuse to renew a nontenured teacher's contract for any reason except "the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons," created a property right in the plaintiff. This property right, the judge said, required the school board to provide full notice of the alleged grounds for nonrenewal and an opportunity to be heard on the question of whether the alleged cause for nonrenewal is "arbitrary, capricious, discriminatory or for personal or political reasons." He then ordered the school board to hold a hearing on this issue. [*See* the *School Law Bulletin*, Vol. VI, No. 1 (January, 1975) for an analysis of this opinion.]

A hearing was subsequently conducted before a panel consisting of five members of the nine-member school board. At the hearing, plaintiff was offered an opportunity to present witnesses in her behalf and was represented by legal counsel. The atmosphere of the hearing was apparently tension-filled. "Sharp tempers, impatience and scars from old animosities were revealed in a number of pointed exchanges between plaintiff's counsel and members of the board." The board members voted to affirm the original decision not to renew plaintiff's contract, and the plaintiff attacked the hearing in the federal district court on the basis that it did not comport with due process standards.

Decision: Judge McMillan upheld the decision of the school board, finding no violation of due process in the hearing, despite a lack of evidence showing that plaintiff was an incompetent teacher. The court did find sufficient evidence to support the board's finding that plaintiff's discharge was not "arbitrary, capricious, discriminatory or for personal or political reasons."

In response to plaintiff's claim that the board members who made up the panel had already made up their minds, the court pointed out that several of the five members had not participated in the original decision. The court found no real evidence of any predisposition against the plaintiff nor was the court willing to find any fundamental unfairness in the "hard-nosed and persistent and sometimes one-sided" manner in which the board members examined and cross-examined the witnesses. Plaintiff also strongly objected to one of the board members who embroidered throughout the hearing. The court reasoned that "while not inspiring confidence in attentiveness or impartiality," such activity likewise falls short of the fundamental unfairness offensive to due process.

At the end of the opinion, the court noted

that essential fairness would be better served if future hearings of this sort were conducted by people unconnected with a particular teacher's nonrenewal. The court suggested that the discharge procedure outlined in the teacher tenure act might provide guidance in developing a procedure for nonrenewal.

STUDENT ORGANIZATIONS MAY NOT DISCRIMINATE ON THE BASIS OF RACE OR SEX. *Uzzell v. Friday*, No. C-74-178-D (M.D.N.C., filed Sept. 16, 1975).

Facts: Two students at the University of North Carolina at Chapel Hill challenged the following three university or student government practices as violations of the Fourteenth Amendment and the Civil Rights Act: (1) the disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group composed exclusively of black students whose membership policies the plaintiffs alleged are discriminatory and whose purpose is allegedly the promotion of a separate racial and cultural identity; (2) the minority representation provision of the Student Constitution which requires that there be at least two blacks, two women, and two men on the Campus Governing Council; and (3) the Student Government Constitution provision which permits appointment to the Student Honor Court to be based on race.

The defendants moved to dismiss and for summary judgment on the grounds that the claims were moot, lacked standing, and/or did not present a case in controversy.

Decision: In a memorandum opinion, the court granted summary judgment for the defendants on the basis that the issues presented lacked justiciability. With respect to the BSM claim, the court noted that although the BSM had operated as an exclusively black organization, it changed its policies in 1974 to allow any student, regardless of race, to become a member. The University pointed out that its present policy of prohibiting disbursement of student funds to a racially exclusive organization is "so clear and its commitment to implementation of the policy so unequivocal that the case is moot since there is no possibility of a recurrence of the challenged activity." The court also pointed out that the present University policy of supporting only organizations whose membership is racially nonexclusive is mandated by the *Revised North Carolina State Plan for the Further Elimination of Racial Duality in the Public Post-Secondary Education Systems* adopted on May 31, 1974, by The UNC Board of Governors. The court noted, however, that it "strongly condemns the approving University officials and the Student Government officials who, with apparent knowledge, for several years disbursed funds collected from mandatory student fees to an organization whose membership policy clearly excluded everyone except black students."

Summary judgment also was granted on the second and third claims. The court found the challenge to the minority representation provision of the Campus Governing Council presented no justiciable case or controversy because the effect of this provision in no way discriminates against the plaintiffs. For the same reason, the court dismissed the challenge to the provision for appointment to the Student Honor Court.

ANNOUNCEMENTS

SCHOOL ATTORNEY'S CONFERENCE. February 6-7, 1976, at the Institute of Government. This annual conference will examine several important school law issues. Mark your calendar now and plan to attend.

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